No. 979

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND, (a Corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Petition of Defendant in Error for Rehearing.

VAN NESS & REDMAN, and
T. C. NAN NESS,
Attorneys for Plaintiff in Error.

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UPON PETITION OF DEFENDANT IN ERROR FOR REHEARING.

In brief response to the argument of petitioner upon application for rehearing, leave having been granted us to reply thereto, we submit the following:

I.

1. BARRATRY: The policy sued on covered against perils of the sea, pirates, assailing thieves, jettisons, barratry of the master, or mariners, etc. (Trans., page 19.)

Under this policy it was open to defendant-in-error to sue for a loss by a peril of the sea, or, alleging misconduct on the part of the master of the "Sudden," to have counted upon a barratrous loss. The election was made, and, upon the theory that the master was authorized to proceed as he did, the action was based upon a loss by a peril of the sea. And having made this election defendant-in-error may not be permitted to recover as for a loss by barratry. Barratry is not a peril of the sea, nor can a recovery be had for such a loss under such a complaint as we have in this case, nor without appropriate averment of the facts upon which barratry is claimed. In the absence of such averment there can be no recovery for a loss so caused.

2 *Phillips' Ins.,* 610.

Blyth vs. *Shepard,* 9 Mees & W. Exch., 768.

The complaint in this case was framed, as we have said, upon the theory that the loss was from a peril of the sea. There was no averment, nor any claim, either in the putting in of the proof, or in the instructions requested, and, or, given, that the loss was barratrous. Upon the contrary the position of the defendant-in-error and its counsel throughout, both in the Circuit Court and in the briefs in this Court, was, that the master of the "Sudden" did, under the circumstances, just what he should have done. And the Court (at the request of defendant-in-error) instructed that the loss was from a peril of the sea. (Trans., p. 329.) Defendant-in-error will not be permitted to plead and try its case upon one theory and, having a decision against it upon that theory, secure a rehearing and a retrial upon another, different, and inconsistent position.

2. The *Civil Code* (Sec. 2629) expressly provides that an insurer is not liable for a loss caused by a willful act

of the insured, and this case is within the protection of that section. The insured, defendant-in-error herein, was the owner of the vessel, and of the insured cargo, and the captain, whose willful running of the ship against a patent danger brought about the loss, was its agent, and his act, as is correctly held in the decision against which this rehearing is asked, was the act of the insured, and for which the insured is responsible. Of course if the captain had sailed the vessel into the ice *against* the express orders, or understood wishes, of the insured, his act, under such circumstances, might be held to be barratrous. But such is not the case. The vessel was dispatched to Nome by the insured at a time when it was necessarily a matter of common knowledge that there was floating ice in the Behring Sea, and as the agent of the insured, and with its consent, he was crowding his ship to her destination to get for his principal the benefit of the early market. The loss, therefore, was not barratrous, and this Court, under these circumstances, correctly held that in putting the vessel into the ice the master was the representative of the insured and the act itself was the act of the insured.

"If" the act complained of "be done in compliance with the owner's instructions or request, or with his assent, it is not barratrous."

1 *Parson's Mar. Ins.*, 567

"If the owners, or quasi owners, are themselves in default, in not preventing an act which would be barratrous, this is equivalent to their assent."

Id., 571

It is admitted by counsel for defendant-in-error that his client left to the judgment of the master the manner of proceeding. (Brief of defendant-in-error in reply to

original brief of plaintiff-in-error, p. 61.) It was left to the discretion of the master, says the counsel, whether the vessel should or should not be put into the ice. And therefore, we submit, it follows, that in going into the ice the master was acting under the authority of the insured, and hence was not, as to the latter, guilty of any wrongdoing upon which a charge of barratry could be based. His act, under the circumstances, was the act of the insured and hence clearly, in no view of the law, barratrous. (*Parsons,* ante.)

To be barratrous the act complained of must be in disregard of some duty to the owner. Anything done with his consent, express or implied, is not barratrous.

1 Abbot's Law Dict., "Barratry," p. 128.

The decision of the Court proceeds upon the theory that, in putting the vessel into the ice, the master was the representative of the insured and the authorities, as we have seen, fully sustain the conclusion announced.

II.

The point made by petitioner under this subdivision was fully discussed in the briefs, and calls, we think, for no further discussion. It is, in fact, without any merit whatever.

III.

As to the new point suggested under this subdivision of the petition we have only to say: *First,* that neither upon the trial, nor in the briefs, was there any hint thereof; and *next,* that there never has been, as to the point upon which our bill of exceptions was taken and our writ of error prosecuted, no claim upon the part of plaintiff-in-error that "by default of insured . . . the insurer never incurred any liability under the policy." We did, in the Court below, base one of our de-

fenses upon the proposition that the "Catherine Sudden" was unseaworthy, and that hence, *as to that defense,* liability under the policy never attached. But the verdict upon that point was against us, and as the testimony upon behalf of defendant-in-error was sufficient to support the verdict in that particular we have not, as to that contention, at any time challenged the judgment. Upon our exceptions, based upon the contentions urged in this Court, we have necessarily conceded that original liability did attach under the policy. Our claim has at all times been that, as to these defenses, the loss was not, as to the going into the ice, within the protection of the policy, and that as to the fraudulent sale at Nome we were released from liability because of the wrongful acts of the defendant-in-error in connection therewith.

IV.

Concerning what is said under this subdivision, we unite with counsel in the hope that the Court will appreciate and understand the diffidence and spirit of frankness and candor in which he makes it. But we also confidently anticipate that the Court will not by reason thereof be misled into giving any consideration to the suggestion itself. Of course, we could offset what counsel says with an adverse counter-statement equally frank and candid touching the frauds perpetrated at Nome to which counsel refers. It occurs to us, however, that as the judgment of reversal is upon grounds wholly distinct and unconnected with those frauds, it is not necessary to burden the Court with any argument in relation thereto.

We respectfully submit that the petition for rehearing should be denied.

VAN NESS & REDMAN, and
T. C. VAN NESS,
Attorneys for Plaintiff-in-Error.